

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN P. MOSCONY, SR.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
U.S. BUREAU OF PRISONS,	:	
UNITED STATES PROBATION	:	
DEPARTMENT,	:	
ATLANTIC MENTAL HEALTH,	:	
RICHARD WADDINGTON, Ph.D.,	:	
Individually,	:	
SANDRA FESTA, Individually,	:	
JUDITH URIE, M.D., Individually,	:	
	:	
Defendants.	:	NO. 96-1607

MEMORANDUM

Reed, J.

November 6, 1997

Plaintiff John P. Moscony, Sr. (“Moscony”), proceeding *pro se*, has filed three petitions for writ of mandamus pursuant to 28 U.S.C. § 1361. Defendants the United States Bureau of Prisons and the United States Probation Department, both entities of the Department of Justice (collectively “Government”), and Atlantic Mental Health (“AMH”),¹ and Sandra Festa (“Festa”), Dr. Richard Waddington (“Waddington”), and Dr. Judith Urie (“Urie”),² all of whom are employees of AMH, have moved to dismiss plaintiff’s petitions for writs of mandamus (Document Nos. 3, 4). After consideration of these motions and the response of Moscony thereto, I will grant the motions of defendants for the reasons that

¹ The correct name of this defendant is Atlantic Mental Health Center, trading as AtlantiCare Behavioral health.

² The correct name of this defendant is Judith Urai.

follow.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 10, 1990, Moscony was sentenced to eighty months of incarceration to be followed by three years of supervised release for money laundering, obstruction of justice, false statements, interstate transportation of money taken by fraud, conspiracy to defraud the United States, and filing false tax returns. Moscony was also fined \$150,000.00 and restitution of \$418,000.00 and forfeiture of certain real and personal property was ordered. Following Moscony's release from incarceration, the Probation Department supervised his release pursuant to the conditions set forth in the judgment of conviction.³

Between 1995 and 1996, Moscony filed three separate petitions for writ of mandamus, all of which pertained to various issues concerning his supervised release.

The first petition (95-5813) was filed November 9, 1995, against the Probation Department. It includes numerous allegations by Moscony that his conviction was improper and that the conditions of his probation and supervised release were unconstitutional. The relief requested is that (1) the Probation Department not require Moscony to sign a financial disclosure form that included a provision that false statements may result in potential criminal prosecution; (2) Moscony not be required to sign documents against his will; (3) supervision of Moscony's release be transferred to the Northfield, New Jersey Probation Office, and (4) an investigation be conducted to determine if the U.S. Attorneys' Office and

³ The conditions of Moscony's supervised release included that he (1) adhere to the installment schedule for payments of fine and restitution; (2) provide financial information requested by the probation office; (3) is prohibited from incurring any new debt or credit charges unless he is in compliance with installment schedules; (4) is prohibited from owning or managing a real estate brokerage or insurance brokerage; and (5) must participate in any mental health evaluation and counseling program deemed appropriate by the probation office.

a probation official engaged in prosecutorial misconduct.

The second petition (95-6045) was filed November 27, 1995 against the Probation Department, AMH, Urie, Waddington, and Festa. It relates in large part to Moscony's psychiatric evaluation by AMH at the request of the Probation Department. In this petition, Moscony seeks a copy of his psychiatric evaluation, as well as copies of previous evaluations, an order preventing the Government from receiving information without providing copies to the individual being evaluated, an explanation as to why a particular psychiatrist was used to evaluate Moscony instead of another one, and an order directing that the probation department cease harassing petitioner and his family.

The third petition (96-219) was filed January 3, 1996 against the Bureau of Prisons, Probation Department, AMH, Urie, Waddington, and Festa. It also relates to Moscony's psychiatric evaluation. In that petition, Moscony requests that the Government provide him with copies of all documents provided to AMH in connection with his psychiatric evaluation. Moscony further requests the implementation of a policy requiring copies of psychiatric evaluations to be provided to the individual being evaluated.

These three petitions were originally filed in the United States District Court for the District of New Jersey. Defendants filed a motion to dismiss Moscony's claims or transfer the action to the Eastern District of Pennsylvania arguing that the alleged bases for the petition arise from petitioner's criminal judgment and sentence imposed by this Court on July 12, 1990 and therefore Moscony's action properly lies in the Eastern District of Pennsylvania. In an Order dated February 22, 1996, the Honorable Joseph H. Rodriguez of the United States District Court for the District of New Jersey characterized Moscony's

petitions as challenges to his conviction, sentence, and court-ordered supervised release, which arose out of the district of conviction, the Eastern District of Pennsylvania. Judge Rodriguez thereby consolidated these petitions and transferred the action to this Court under Civil Action No. 96-1607.

The Clerk of this Court docketed and designated the transferred action as a motion for federal habeas corpus pursuant to 28 U.S.C. § 2255. Subsequently, in an Order dated October 23, 1996, this Court found that the three petitions should not be characterized as an action brought pursuant to 28 U.S.C. § 2255 (relating to actions to vacate, set aside or correct a sentence), but should be construed as an action brought pursuant to 28 U.S.C. § 1361 (relating to actions to compel an officer, employee, or agency of the United States to perform his or her duty). The Court further tentatively concluded that venue over this action lies properly in the District of New Jersey and ordered the defendant to submit briefing on this issue. The Government subsequently represented to the Court that it had no objections to the transfer of the action to the District of New Jersey.

In an Order dated May 27, 1997, this Court raised, *sua sponte*, the issue of whether this Court, or any other federal court, had subject matter jurisdiction over the actions and relief requested by Moscony in his three petitions. Recognizing the likely delay in the ultimate resolution of the case if it is transferred back to the District of New Jersey, this Court ordered the Government and AMH, on behalf of itself and its named employees, to submit a motion including supporting legal memoranda addressing whether the Court has jurisdiction to each defendant and whether the claims are legally frivolous. The Government and AMH filed appropriate motions to dismiss. This Court, in an Order dated June 3, 1997,

stayed resolution of the transfer to the District of New Jersey pending the outcome of the jurisdictional determination.

Against this procedural background, I will now turn to the jurisdictional inquiry. A district court is obligated to and has the power to raise the question of subject matter jurisdiction even if the parties do not raise the issue. Wright and Miller, Federal Practice and Procedure: Civil 2d §§ 1350, 3522; Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1049 (3d Cir. 1993); Walls v. Ahmed, 832 F. Supp. 940, 941 (E.D. Pa. 1993). Subject matter jurisdiction must be satisfied and is not waivable by the parties. Wright and Miller, supra, at §§ 1350, 3522. Because my jurisdictional analysis below concludes that subject matter jurisdiction is lacking in this Court as well as any other federal court, any transfer to the District of New Jersey, although venue may properly lie therein, would be meaningless and only delay the resolution of this case.

II. DISCUSSION

Mandamus is an appropriate remedy in extraordinary circumstances only.

Madden v. Myers, 102 F.3d 74, 79 (3d Cir. 1996). The federal mandamus statute provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361.

1. AMH, Waddington, Festa and Urie Defendants

A mandamus action will not lie unless the defendants are officers or employees of the United States or a federal agency. Griffith v. Bell-Whitley Community

Action Agency, 614 F.2d 1102, 1106 (6th Cir.), cert. denied, 447 U.S. 928 (1980); Pankey v. Webster, 816 F. Supp. 553, 558 (W.D. Mo. 1993); see also Bucks County Bd. of Comm'rs v. Interstate Energy Co., 403 F. Supp. 805, 810 (E.D. Pa. 1975). AMH and its three employees named as defendants contend that this Court has no subject matter jurisdiction over Moscony's claim against them for mandamus under Section 1361 because AMH is not a federal agency and Festa, Urie, and Waddington are not federal employees or officers.⁴ Even though AMH is in receipt of some federal funds, this will not render it subject to the mandamus statute. See Griffith, 614 F.2d at 1106 (citing cases). I find that the absence of the necessary prerequisite of federal status deprives this Court of subject matter jurisdiction with respect to AMH, Festa, Urie, and Waddington. Accordingly, I will dismiss with prejudice these defendants from the lawsuit.⁵

2. Government Defendants

For purposes of a motion to dismiss, an individual seeking a writ of mandamus must allege that (1) he has a clear right to the relief requested, (2) the defendant has a clear duty to act, and (3) there is no other adequate remedy. See Taylor v. Department of Labor, 552 F. Supp. 728, 744 (E.D. Pa. 1982), aff'd, 725 F.2d 670 (3d Cir. 1983); see also

⁴ AMH is a New Jersey not-for-profit corporation. It has received § 501(c)(3) status from the Internal Revenue Service. (Aff. of Silver ¶ 2).

⁵ Assuming arguendo that AMH was a federal agency and its employees were federal employees, the petitions of Moscony could be dismissed on two other grounds. First, Moscony has failed to allege that any duty was owed to him, and thus deprives this Court of subject matter jurisdiction. See discussion infra Part II.2. Second, AMH maintains that it has provided to Moscony all the copies and documentation requested by Moscony, and thus the action against AMH and its employees is moot.

Madden, 102 F.3d at 79. The court in Taylor stated: “In order for mandamus to issue, a plaintiff must show that an officer or agency of the United States owes him a legal duty which is a specific, plain ministerial act devoid of the exercise of judgment or discretion. An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt.” Id.

To briefly summarize the relief sought in the three petitions, Moscony requests (1) a complete copy of the Government’s medical and psychiatric file concerning him; (2) a copy of all reports of Urie’s examination of Moscony which the Government received from either AMH or its employees; (3) a written explanation as to why one particular psychiatrist was used to evaluate Moscony instead of another; (4) that the Probation Department cease requesting that he sign a standard financial disclosure affidavit or any papers against his will; (5) that the supervision of his case be transferred to the Northfield, New Jersey office; (6) an investigation to determine whether prosecutorial misconduct was involved; and (7) that the Government stop harassing him.

The first and second requests fail on several grounds. As mentioned earlier, the requested copies of medical and psychiatric reports have been provided to Moscony, and thus the action is moot to the extent that such relief is requested. Also, Moscony has not alleged that there is no other adequate remedy available. It is possible that Moscony may obtain relief under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act, 5 U.S.C. § 552, which provide mechanisms to citizens to acquire information from governmental entities and challenge denials of such requests for information. And, finally, Moscony has not pointed to any statute, regulation, constitutional provision or otherwise

delineating that he has clear right to copies of documents from his medical and psychiatric file. It is far from clear that the Government is duty bound to provide these copies to Moscony.

The third, fourth, and fifth requests for relief also do not allege any duty -- constitutional, statutory, or otherwise -- owed by the Government to Moscony. Nor do the petitions allege that the Government failed to perform any ministerial duty. To the contrary, the judgment of conviction requires Moscony to provide financial information requested by the probation office and must participate in any mental health evaluation and counseling program deemed appropriate by the probation office. With this in mind, I find that it is within the discretion of the Government and the AMH to utilize any psychiatrist deemed appropriate and that Moscony is not entitled as a matter of right to an explanation thereof. I also find that Moscony does not have a right to be free from providing financial information to the probation office. In the absence of a clear right in Moscony and a clear duty in the Government, I conclude that mandamus is not appropriate. And, Moscony's request that the supervision of his release be transferred to Northfield, New Jersey is now moot, as the Government reports that such transfer has taken effect. See Mem. of Gov't at 6 n.5.⁶ Because Moscony's supervision has been transferred, there is no longer a live case or controversy between the parties on this issue. See United States ex rel. Harrison v. Pace, 380 F. Supp. 107, 109-10 (E.D. Pa. 1974).

And, finally, the fifth and sixth requests for relief for general harassment and misconduct allegations fail for similar reasons. Moscony has not adequately alleged that he

⁶ Again, even if the supervision of Moscony's release had not been transferred, Moscony has not alleged and it is not likely that he is clearly legally entitled to be transferred to an office of his choosing or that the Government owes him a duty to do so.

has a clear right to the relief requested or that the Government has a clear, non-discretionary, ministerial duty to investigate Moscony's claims of prosecutorial misconduct or to alter in any way its treatment of and conduct toward Moscony. Neither Moscony, the Government defendants, nor my research has informed me that there is any legally recognized right to the type of relief sought by Moscony in his fifth and sixth requests.

Moscony has not requested nor do I find any basis exists to allow amended pleadings because any rational amendment would suffer from legal futility and the action ultimately would be dismissed.

III. CONCLUSION

For the foregoing reasons, the allegations of Moscony are insufficient to confer subject matter jurisdiction upon this Court or any other federal court. Accordingly, I will dismiss with prejudice the petitions brought by Moscony.

An appropriate Order follows.

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RICHARD WADDINGTON, Ph.D.,		:
Individually,	:	
SANDRA FESTA, Individually,		:
JUDITH URIE, M.D., Individually,		:
		:
Defendants.		NO. 96-1607

ORDER

AND NOW, on this 6th day of November, 1997, after considering the motions of defendants United States Bureau of Prisons, United States Probation Department, Atlantic Mental Health, Richard Waddington, Ph.D., Sandra Festa, and Judith Urie, M.D. to dismiss the petitions of John P. Moscony ("Moscony") for writs of mandamus (Document Nos. 3, 4), and the response of Moscony thereto, and for the reasons discussed in the foregoing memorandum, it is hereby accordingly **ORDERED** that the motions to dismiss are **GRANTED** and that all the **PETITIONS for WRITS of MANDAMUS** consolidated here are **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction.

This case is closed.

LOWELL A. REED, JR., J.